Supreme Court, U.S.
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No. 89-453

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

METRO BROADCASTING, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER METRO BROADCASTING, INC.

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February, 1990

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Federal Communications Commission's policies of awarding substantial preferences in comparative broadcast licensing proceedings to minority and female applicants, created in the absence of any findings of prior discrimination and applied for the sole purpose of fostering program diversity, violate the equal protection component of the Due Process Clause of the Fifth Amendment to the Constitution of the United States of America.

2. Whether Congress' 1988, 1989 and 1990 appropriations legislation, which closed down the Federal Communications Commission's first comprehensive examination of the factual, statutory and constitutional bases for its minority- and gender-based preference classification policies; defunded any reexamination of, changes in, or appeal regarding the policies, and ordered the reinstatement and maintenance of the race-, ethnic- and gender-based classifications, absent historical evidence of prior discrimination and for the sole purpose of fostering program diversity, exceeded congressional authority under Section 5 of the Fourteenth Amendment and violated the equal protection principle embodied in the Due Process Clause of the Fifth Amendment to the Constitution of the United States of America.

LIST OF PARTIES AND PARTIES' STRUCTURES

The parties in *Winter Park Communications, Inc. v. Federal Communications Commission*, 873 F.2d 347 (D.C. Cir. 1989) (consolidated case nos. 85-1755 and 85-1756) were appellants Metro Broadcasting, Inc. (Metro) and Winter Park Communications, Inc. (Winter Park), appellee Federal Communications Commission (FCC or Commission), intervenors Rainbow Broadcasting Company (Rainbow), City of Winter Park and Winter Park Chamber of Commerce, and amicus curiae United States of America. Winter Park, the Chamber and the City have no further interest in this case. The parties' structures are set forth in Metro's *Petition for Certiorari (Petition)*, at p. ii, which is incorporated herein by reference pursuant to Rule 29.1 of this Court.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER METRO BROADCASTING, INC.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the District of Columbia Circuit (court of appeals or lower court), upholding the policies and enactments challenged herein is reported at 873 F.2d 347 (D.C. Cir. 1989), and reproduced at page 1a of the appendices to Metro Broadcasting Inc.'s (Metro's) petition for certiorari (Petition). (Pet. App. 1a).[1] The Decision of the Commission's Review

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[1] References to material contained in the Appendices attached to Metro's petition for certiorari herein shall be cited to the page at which such material appears; *i.e.*, Pet. App. 1a. References to material contained in the Joint Appendix filed contemporaneously herewith shall be cited to the page at which such material appears therein; *i.e.*, J.A. 1.

Board (Pet. App. 64a) to award a new UHF television station construction permit at Orlando, Florida to Rainbow Broadcasting Company (Rainbow) and deny the competing application of Metro[2] is published at 99 FCC 2d 688 (Rev. Bd. 1985). The FCC's Order (Pet. App. 60a) denying review of the Review Board's Decision is unpublished. The Commission's Memorandum Opinion and Order holding the proceeding in abeyance following remand by the court of appeals (Pet. App. 52a) is reported at 2 FCC Rcd 1474 (1987). The Commission's subsequent Memorandum Opinion and Order reactivating its affirmance of the Review Board's Decision following congressional directives in appropriations legislation for fiscal year 1988 (Pet. App. 48a) is published at 3 FCC Rcd 866 (1988).

JURISDICTION

The Opinion (Pet. App. 1a) and Judgment (Pet. App. 94a) of the court of appeals were entered on April 21, 1989, as was an order withholding issuance of the mandate pending any timely petition for rehearing and/or suggestion for rehearing *en banc*. (Pet. App. 47a). Metro's petition for rehearing and suggestion for rehearing *en banc* was denied on June 21, 1989. (Pet. App. 96a). Metro's petition for a writ of certiorari was filed on September 18, 1989, and granted on January 8, 1990. (J.A. 5). The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent provisions of the Constitution of the United States of America are the Fifth Amendment thereto (Pet. App. 100a) and Sections 1 and 5 of the Fourteenth

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Material contained in the Supplemental Joint Appendix filed with the lower court shall be cited to the page at which such material appears therein; *i.e.*, S.J.A. 1. References to the statute reprinted in the Appendix hereto shall be cited to the page at which the relevant passage appears therein; *i.e.*, App. 1.

[2] The application of Winter Park Communications, Inc. (Winter Park) also was denied for reasons not here relevant.

Amendment thereto. (Pet. App. 100a). The germane sections of the *Communications Amendments Act of 1982*, Public Law 97-259, 96 Stat. 1087 (1982), *codified* at 47 U.S.C. §§ 309(i)(3)(A) - (4)(A) (1987), are reprinted at Pet. App. 102a. The relevant provisions of the *Continuing Appropriations Act for Fiscal Year 1988 and for Other Purposes*, Public Law No. 100-202, 101 Stat. 1329-31 (1987), are reproduced at Pet. App. 101a. The applicable provisions of the *Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act of 1989*, Public Law 100-459, 102 Stat. 2216-17 (1988) are set forth at Pet. App. 101a. The appropriate portions of the *Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act of 1990*, Public Law 101-162, 103 Stat. 988 (1989), are attached hereto as Appendix (App.) A.[3]

STATEMENT OF THE CASE

Metro, petitioner, filed an application for a construction permit for a new television station on Channel 65 at Orlando, Florida, in 1982. Rainbow, respondent, filed its competing application later that year, and the two mutually exclusive applicants were pitted against one another in the crucible of a comparative hearing pursuant to Section 309(e) of the Communications Act of 1934, as amended (Communications Act or the Act).[4] Because Rainbow received enhancement credits for its attributable 90% Hispanic and 5% female (included within the Hispanic attribution) ownership composition, it ultimately prevailed

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[3] The legislation was enacted following the filing of Metro's petition for certiorari and was not included therein. Nevertheless, the provisions which continue to stifle any attempt by the Commission to reexamine its race-ethnic- and gender-based preferences in comparative licensing proceedings are relevant to the instant case and govern the position taken by the FCC herein.

[4] 47 U.S.C. § 309(e) (1982); *Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U.S. 327, 333 (1945).

under the Commission's race-, ethnic- and gender-based preference scheme. (Pet. App. 6a, 50a, 61a, 87a and 88a).[5]

A. The Evolution of the Commission's Comparative Process and the Development of Minority and Female Preferences Therein

The Communications Act directs that, in awarding radio and television licenses, the Commission determine whether its grant of a particular application will serve the "public convenience, interest and necessity." 47 U.S.C. § 307(a). *See also* 47 U.S.C. § 309(a). Pursuant to this mandate, each applicant for authority to construct a new broadcast station must meet certain basic qualifications[6] and, when mutually exclusive applications are filed, a comparative hearing must be held to determine which applicant is best able to serve the public interest.[7]

The procedures governing the Commission's comparative hearing process appear in Sections 309 and 311 of the Act. 47 U.S.C. §§ 309, 311. The Act, however, does not specify what factors the FCC must take into account in rendering its public interest determination. Prior to 1965, competing applicants were free to introduce evidence on any issue which they felt demonstrated their superior qualifications to operate a broadcast station on the frequency

[5] Metro received a minority enhancement credit for the 19.8% integrated ownership share of Elmer Neal Lincoln, a black male. *Metro Broadcasting, Inc.*, 96 FCC 2d 1073, 1088 (ALJ 1983) (S.J.A. 39); *Metro Broadcasting, Inc.*, 99 FCC 2d 688, 703 (Rev. Bd. 1984) (Pet. App. 87a). However, the Commission's Review Board held that this was insufficient to overcome the "substantial preference" to be awarded Rainbow for its minority and female ownership structure. 99 FCC 2d at 703 (Pet. App. 87a).

[6] These include the submission of facts regarding the "citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station . . . ." 47 U.S.C. § 308(b).

[7] 47 U.S.C. § 309(e); *Ashbacker Radio Corp.*, 326 U.S. at 333 (1945).

in question,[8] and the adjudicative process provided little guidance as to the relative weights to be accorded various indicia of comparative merit.[9] Gradually, however, the Commission began to identify the factors to be used to choose the best qualified applicant.[10]

1. The *1965 Policy Statement*

In order to clarify its policies regarding the comparative criteria and their use in licensing proceedings, in 1965, the Commission issued its *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965) (*1965 Policy Statement*). The *1965 Policy Statement* explained that the two main goals for selection among qualified applicants were: (1) to effect the maximum diffusion of control of the media of mass communications ("diversification"); and (2) to achieve the best practicable service to the public. *Id.* at 394.

The *1965 Policy Statement* characterized the diversification factor as of "primary significance" in the FCC's licensing scheme. *Id.* Thus, applicants owning no existing media concerns were preferred over applicants with such interests.[11] The second factor enumerated in the *1965 Policy Statement*, participation in station operation by owners ("integration of ownership into management"), was held of "substantial importance" in securing the "best practicable service." Id. at 395. The Commission stated that cer-

[8] *Amendment of the Commission's Rules to Allow the Selection from Among Competing Applicants for New AM, FM and Television Stations By Random Selection (Lottery)*, 4 FCC Rcd 2246, 2258, 2266 n. 15 (1989) (*Lottery Rulemaking*).

[9] *Id.* at 2258.

[10] *Id.*

[11] *Lottery Rulemaking*, 4 FCC Rcd at 2258. The Commission noted that other media interests in the principal community proposed to be served would be of most significance, followed by other interests in the remainder of the proposed service area and, finally, other interests in the United States. *1965 Policy Statement*, 1 FCC 2d at 394.

tain attributes of participating owners would be considered in weighing this criterion, including local residence, past participation in civic affairs within the service area, and prior broadcast experience. *Id.* at 396.

The *1965 Policy Statement* listed other factors which the Commission considered potentially significant. One was an applicant's planned program service. *Id.* at 397. Another was the past broadcast record of any applicant principal who previously participated in station ownership. *Id.* at 398. Finally, the Commission announced that, when appropriate, comparative consideration would be accorded to proposed efficiency of frequency use, *id.*, character qualifications, *id.* at 399, and any other "relevant and substantial factor" designated by the Commission. *Id.*

2. Judicial Directives: The Advent of Minority Preferences in Comparative Broadcast Proceedings

The criteria specified in the *1965 Policy Statement* were both race- and gender-neutral. *Chapman Radio and Television Co.*, 19 FCC 2d 157, 183 (1969), *reconsideration denied*, 20 FCC 2d 624 (Rev. Bd. 1969); *Mid-Florida Television Corp.*, 33 FCC 2d 1, 17-18 (Rev. Bd.), *review denied*, 37 FCC 2d 559 (1972), *rev'd*, *TV 9, Inc.* v. *FCC*, 495 F.2d 929 (D.C.Cir. 1973), *cert. denied*, 419 U.S. 986 (1974) (*TV 9*). Only an applicant's "experience, background, and knowledge of the community" were deemed appropriate considerations under the integration component of "best practicable service." 495 F.2d at 936. Both the Commission and its Review Board initially refused to consider an applicant's race as an independent[12] comparative factor in *Mid-Florida Television Corp.*, *supra*, maintaining that such

[12] The Review Board did not foreclose the possibility that an applicant could render a showing sufficient to establish that, in a particular case, black ownership could be considered. The Board merely noted that "such a showing is absent here . . . ." *Id.*

ownership "must be shown . . . to result in some public interest benefit." *Id.* at 18. Ultimately, this position was supplanted by the courts.

In *TV 9*, the D.C. Circuit rejected the Commission's argument that "the 'Communications Act, like the Constitution is color blind,' " holding that "when minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should be awarded" in the comparison. 495 F.2d at 936-38. The court rebuffed the Commission's demand that an applicant seeking minority credit provide assurance of superior community service attributable to such ownership, declaring that "[r]easonable expectation, not advance demonstration, is a basis for merit to be accorded relevant factors." *Id.* at 938. Thus was born the "programming diversity" defense that the Commission advances today. Subsequently, in *Garrett* v. *FCC*, 513 F.2d 1056 (D.C. Cir. 1975), the court refused to accept the FCC's view that credit for minority status should be recognized only where a nexus between race and program diversity is demonstrated, proclaiming that race presumptively would promote such diversity when minority owners are integrated into the management of a proposed station.[13]

Following the court's directives, the Commission concluded minority ownership and participation should receive credit in the comparative process, deciding enhancements would be awarded to minority applicants under the "best practicable service" criterion. *WPIX*, Inc., 68 FCC 2d 381, 411 (1978).[14] As originally conceived, this enhancement

[13] *Id.* at 1063. The court stated that "black ownership and participation together are themselves likely to bring about programming that is responsive to the needs of the black citizenry . . . ." *Id.*

[14] The Commission also developed other policies designed to promote minority ownership of broadcast facilities through preferences, including the distress sale policy, which allows a broadcaster whose license is in jeopardy due to a renewal or revocation proceeding to sell the station at up to 75% of market value to a minority-owned, or minority-controlled purchaser, and a policy of affording tax certificates to sellers

consisted of a "plus-factor weighed along with all other relevant factors in determining which applicant is to be awarded a preference." *TV 9*, 495 F.2d at 941 n. 2.[15] *See also Garrett*, 513 F.2d at 1062 n. 40. However, in *Waters Broadcasting Corp.*, 91 FCC 2d 1260 (1982),[16] the modest "plus-factor" was elevated, *sub silentio*, to "significant weight." *Id.* at 1267.[17] Subsequent cases followed the revised *Waters* formula, and by 1986, the Commission referred to its minority[18] "enhancement" as a "preference policy," drawing no distinction between "merit" and "preference."[19]

of media properties where the purchaser is minority-owned or minority-controlled. *Statement of Mark S. Fowler, Chairman, Federal Communications Commission, Before the Subcommittee on Telecommunications, Consumer Protection, and Finance of the House Committee on Energy and Commerce* (Oct. 2, 1986). Three weeks before a panel of the court of appeals decided this case, a different panel of the same court, in *Shurberg Broadcasting of Hartford, Inc.* v. *FCC*, 876 F.2d 901 (D.C. Cir. 1989) struck down the Commission's distress sale policy. This Court granted Astroline Communications' petition for certiorari in the distress sale case on January 8, 1990 (Case No. 89-700), and will hear oral arguments on the distress sale policy following consideration of the issues presented herein.

[15] The *TV 9* court distinguished between the award of a preference and the recognition of merit, claiming the minority factor to be one of merit only. The court stated:

> We use "preference" to mean a decision by the Commission that the qualifications of a particular applicant in a comparative hearing are superior to those of another applicant with respect to one or more of the issues upon which the grant of a permit or license turns. "Merit" or "favorable consideration" is a recognition by the Commission that a particular applicant has demonstrated certain positive qualities which may but do not necessarily result in a preference. "Merit," therefore, is not a "preference" but a plus-factor weighed along with all other relevant factors in determining which applicant is to be awarded a preference. *Id.* at 941 n. 2.

[16] *aff'd sub nom., West Michigan Broadcasting Co.* v. *FCC*, 735 F.2d 601 (D.C. Cir. 1984).

[17] In *Waters*, the Commission admonished its Review Board for according insufficient weight to the "minority ownership" factor in its comparison between a non-local minority female and a local, non-minority applicant that was equal on the primary criterion of diversification and superior on every other standard comparative factor (i.e., integration of ownership with management, local residence, local civic activities), reversing the Board's award of the construction permit to the local applicant and awarding the construction permit to the minority female. *Id.*

[18] The Commission's early decisions, as well as the court cases discussed *supra*, considered the use of an enhancement factor for "black" ownership and participation, rather than for minority ownership generally. However, following Congress' passage of § 115 of the *Communications Amendments Act of 1982*, Public Law 97-259, 96 Stat. 1087, Sept. 13, 1982 (codified at 47 U.S.C. §§ 309(i)(3)(A) - (4)(A)) (Pet. App. 102a), which required that preferences for minority applicants be incorporated into any random selection licensing scheme adopted by the Commission, the FCC began to award enhancements for ownership and participation by Hispanics, American Indians, Alaska Natives and Pacific Islanders. *E.g., Metro Broadcasting, Inc.*, 99 FCC 2d at 704. (Pet. App. 88a).

[19] *Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications*, 1 FCC Rcd 1315 (1986), *modified*, 2 FCC Rcd 2377 (1987).

[20] The decision had its genesis in an opinion written upon reconsideration in *Gainesville Media, Inc.* 70 FCC 2d 143 (Rev. Bd. 1978), where the Review Board simply stated that, "[u]pon further reflection, we now believe the better course is to consider female ownership and participation, despite the absence of record evidence regarding the [extent of female ownership in the mass media in Gainesville]." *Id.* at 149. The preference did not alter the outcome of the *Gainesville* proceeding.

3. The Commission's Adoption of Gender-Based Preference Classifications

The FCC's Review Board extended the minority preference to females in *Mid-Florida Television Corp.*, 70 FCC 2d 281 (Rev. Bd. 1978), *set aside on other grounds*, 87 FCC 2d 203 (1981).[20] The Board stated that merit was warranted for female ownership and participation "upon essentially the same basis as the merit given for black ownership and participation." *Id.* at 326. Nevertheless, the Board concluded that the preference should be somewhat

less significant because "the need for diversity and sensitivity reflected in the structure of a broadcast station is not so pressing with respect to women as it is with respect to blacks." *Id.* The Commission later acquiesced in the Board's decision,[21] and the female preference was established.

4. The Mechanics of Modern Comparative Selection

The Commission's comparative process has grown more complex in the 25 years following release of the *1965 Policy Statement*. Changes in the process have resulted in a shift of emphasis in comparative proceedings. Although the *1965 Policy Statement* remains the departure point for comparative analysis, through time, some factors have proven less significant than anticipated by the Commission and others have assumed greater importance.

a. Diversification

Diversification of ownership of mass media, the FCC's primary comparative criterion, is of such overwhelming importance, e.g., *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 697 (1978), that it is seldom a factor in modern comparative rankings. Under the diversification criterion, interests in other communications media push an applicant below its comparative starting point. *WPIX, Inc.*, 68 FCC 2d at 385. "[A]n applicant having no other attributable mass media interests will all but certainly prevail over a party with such interests." *Newton Television, Limited*, 3 FCC Rcd 553 (Rev. Bd. 1988), *modified*, 4 FCC Rcd 2561 (1989). Persons with other media interests thus frequently refrain from entering the comparative fray. Those who join the comparative process, however, often can avoid scrutiny under the diversification criterion. First, applicant principals may pledge to divest themselves of existing holdings upon grant of their applications, thus avoiding a diversification demerit. *E.g.*, *J.T.*

[21] *E.g.*, *Horne Industries, Inc.*, 94 FCC 2d 815 (Rev. Bd. 1983), *modified*, 98 FCC 2d 601, 602-03 (1984).

Parker Broadcasting Corp., 4 FCC Rcd 5729 (ALJ 1989).[22] *Accord, FM Broadcast Assignments*, 101 FCC 2d 638 (1985). Second, parties may structure their applications to avail themselves of FCC policies preventing the attribution of media interests held by passive investors.[23] Accordingly, an astute applicant may avoid diversification considerations, regardless of whether the applicant or its principals have other media interests.

b. Best Practicable Service: Quantitative Integration of Ownership Into Management

Although ostensibly less weighty than the diversification criterion,[24] the quantitative degree to which new station owners propose to be integrated into management, as enhanced by certain qualitative attributes that elevate the applicant for comparative purposes,[25] remains the predominant consideration under the Commission's "best practicable service" factor.[26] Quantitative credit is calculated by

[22] In one recent case, *Richardson Broadcasting Group*, FCC 89D-50 (ALJ released November 9, 1989), a Commission administrative law judge noted that "[i]t has become standard practice for an FM applicant to avoid a comparative diversification demerit simply by pledging to divest themselves of their existing aural holdings if they are granted. . . . [C]rediting an FM applicant's divestment pledge, even a good faith pledge . . . allows the applicant to skirt the Commission's goal of diffusing control of mass communications media." *Id.* at n. 10.

[23] See *Attribution of Ownership Interests*, 97 FCC 2d 997 (1984), *modified*, 58 RR 2d 604 (1985), clarified, 1 FCC Rcd 802 (1986) (*Ownership Attribution*); *Daytona Broadcasting Co. Inc.*, 103 FCC 2d 931, 934-935 (1986) (making applicable the criteria set forth in *Ownership Attribution* to comparative cases for diversification purposes). *See also Payne Communications, Inc.* 1 FCC Rcd 1052 (Rev. Bd. 1986).

[24] *E.g.*, *Snake River Television, Inc.*, 26 FCC 2d 380 (Rev. Bd. 1970).

[25] *WPIX, Inc.*, 68 FCC 2d 381.

[26] *E.g.*, *New Continental Broadcasting Co.*, 88 FCC 2d 830, 850 (Rev. Bd. 1982), *reconsideration denied*, 89 FCC 2d 631 (1983); *Merrimack Valley Broadcasting, Inc.*, 92 FCC 2d 506 (Rev. Bd. 1982).

determining the voting ownership interest[27] of each integrated principal, and totaling it within four categories of planned participation at the new station: full-time, substantial, part-time and none.[28] Such credit is critical in comparative proceedings because qualitative attributes cannot overcome clear quantitative differences in integration.[29]

The difficulty in attempting to evaluate the veracity of an applicant's integration pledge, coupled with the desire of each applicant to maximize consideration of qualitative attributes, has rendered the quantitative calculation of limited significance. Most applicants propose 100% quantitative integration, or close to it, to maximize credit for various enhancement factors. Moreover, current FCC policies permit an applicant to structure its application so that principals not intending to participate in station management are not counted in the quantitative calculation.[30] The proliferation of "two-tiered" organizational structures, in which limited partners or non-voting shareholders hold ownership interests in an applicant but are not counted

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[27] *High Sierra Broadcasting, Inc.*, 96 FCC 2d 423 (Rev. Bd. 1983).

[28] For example, an applicant with four voting shareholders, each holding a 25% equity interest which proposes to integrate three of its shareholders full-time into the management of the new station would receive a 75% full-time quantitative integration credit.

[29] *Committee for Community Access* v. *FCC*, 737 F.2d 74 (D.C. Cir. 1984); *Absolutely Great Radio, Inc.*, 55 Rad. Reg. 2d (P&F) 15, 21 (1983); *Merrimack Valley Broadcasting, Inc.*, 92 FCC 2d 506 (Rev. Bd. 1982); *Scott & Davis Enterprises, Inc.*, 88 FCC 2d 1090 (Rev. Bd. 1980); *Van Buren Community Service Broadcaster, Inc.*, 87 FCC 2d 1018 (Rev. Bd. 1980); *Alexander S. Klein, Jr.*, 69 FCC 2d 2134 (Rev. Bd. 1978). In *Merrimack*, the Commission's Review Board noted that "in the seventeen years of comparative proceedings under the *1965 Policy Statement*, no case of which we are aware has been decided where the applicant with the clear quantitative integration advantage did not receive the preference under this criterion." *Id.*

[30] See *Ownership Attribution*, 1 FCC Rcd 802 (1985); *Anax Broadcasting, Inc.* 87 FCC 2d 483 (1981); *Cotton Broadcasting Company*, 4 FCC Rcd 1781 (1989); *Daytona Broadcasting Co. Inc.*, 103 FCC 2d 931 (1986); *Religious Broadcasting Network*, 3 FCC Rcd 4085 (Rev. Bd. 1988).

for integration[31] prompted one FCC administrative law judge to note that "[w]ith ever increasing frequency, broadcast applications are being structured to claim maximum integration and enhancement credit."[32] Accordingly, determinations regarding integration of ownership into management (and thus, "best practicable service") invariably turn on qualitative enhancement factors, or preferences.[33]

c. Best Practicable Service: Qualitative Integration Enhancement Factors

The qualitative attributes of participating owners which can enhance an applicant's quantitative integration proposal in FCC proceedings have not changed significantly since the *1965 Policy Statement*. However, the addition of minority and female preferences to the enhancement scheme and the frequent presence of two-tiered ownership structures, have affected the relative weights of the enhancement factors, which currently are: (1) present or proposed local residence by integrated personnel in the station's community or proposed service area; (2) the degree to which minority and female owners will be integrated into station management; (3) past participation in civic activities within the community of license or proposed service area, and (4) the past broadcast experience of integrated principals.[34] The most significant modern en-

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[31] An applicant consisting of 2 voting shareholders, each with a 25% ownership interest and proposing 100% integration into management, and 2 non-voting shareholders, each with a 25% ownership interest but not proposing integration, for example, receives 100% quantitative credit and only attributes of its voting shareholders are considered for qualitative comparative purposes.

[32] *Pacific Television, Ltd.*, FCC 86D-43, slip op. (ALJ released July 26, 1986). The administrative law judge went on to remark that "it is simply unjust to allow an applicant to benefit from a sham arrangement designed to create the illusion of maximum integration credit to the detriment of a competing legitimate applicant." *Id.*

[33] *E.g., Independent Masters, Ltd*, 104 FCC 2d 178, par. 17 (Rev. Bd. 1986).

[34] *Lottery Rulemaking*, 4 FCC Rcd 2246, 2259 (1989).

hancement factors are local residence and minority or female status. Local residence and minority status ostensibly are co-equal in weight.[35] Female status is entitled to somewhat less weight than minority status,[36] but, as noted, the exact weight of the female enhancement remains uncertain. Civic participation, considered part of a proposed owner's local residence background, is close on the heels of the foregoing in terms of importance.[37] Past broadcast experience, a distant last, usually is only a tie-breaker. *Id.*

FCC administrative law judges award preferences to applicants based on these enhancement factors, ranging from "overwhelming" to "substantial" to "moderate" to "slight" to "very slight."[38] In making this determination, the enhancements are viewed within their attributable, quantitative contexts. For example, a corporate applicant consisting of three $33^1/_3\%$ shareholders, one local resident with voting privileges and two non-residents without voting rights, proposing to integrate the voting shareholder into management, would be entitled to enhancement credit for its proposed 100% local resident ownership structure; the non-voting shareholder's attributes would not be considered. Thus, careful attention paid to structuring an application often can assure victory under the "best practicable service" criterion for those maximizing use of the Commission's enhancement and attribution policies.

d. Other Comparative Factors

The *1965 Policy Statement* specified other factors once considered of comparative significance. However, in mod-

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[35] *E.g., Radio Jonesboro, Inc.*, 100 FCC 2d 941, 945-946 (1985); *Linda Crook*, 3 FCC Rcd 354 (1988). *But see Waters Broadcasting Corp.*, 91 FCC 2d 1260, 1267 (1982) (where Commission allowed a minority female from a distant city to prevail over a local, non-minority applicant that was superior on every other comparative factor).

[36] *Mid-Florida Television Corp.*, 69 FCC 2d 607, 652 (Rev. Bd. 1978), *set aside on other grounds*, 87 FCC 2d 203 (1981).

[37] *1965 Policy Statement*, 1 FCC 2d at 396.

[38] *Lottery Rulemaking*, 4 FCC Rcd at 2259.

ern comparative proceedings, those factors are of limited import. The criteria for proposed program service[39] and past broadcast record,[40] for example, almost never are at issue in comparative decisions.[41] The criterion for efficient use of a frequency,[42] known today as "comparative coverage," also seldom is at issue because the credit awarded for bringing service to more persons is generally only "very slight."[43] In 1986, the Commission announced that character issues would no longer be relevant in comparative proceedings where consideration of such issues would not result in disqualification.[44] Thus, the Commission's quantitative and qualitative integration assessments under the "best practicable service" criterion remain dispositive in most cases

5. Application of the Minority and Female Preferences in the Instant Case.

This case was decided, not surprisingly, under the Commission's "best practicable service" criterion. The Review Board awarded Metro a "79.2% full-time plus 19.8% part-

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[39] *1965 Policy Statement*, 1 FCC 2d at 397.

[40] *Id.* at 398.

[41] *Lottery Rulemaking*, 4 FCC Rcd at 2266 n. 17. Applicants seeking to add such issues to FCC proceedings first must provide an extremely stringent threshold evidentiary showing demonstrating the unusual record of their past broadcast records or unusual superior devotion to public service as a result of their programming proposal. The required showing rarely is met. *E.g. Commercial Radio Institute*, 78 FCC 2d 1016 (Rev. Bd. 1980); *Gilbert Group Inc.*, 49 Rad. Reg. 2d 1081, 1082 (P & F) (1981); *Omaha TV 15*, 4 FCC Rcd 730 (1989).

[42] *1965 Policy Statement*, 1 FCC 2d at 398.

[43] *E.g., Armando Garcia*, FCC 87D-25 (ALJ 1987); *Alan K. Levin*, 96 FCC 2d 710 (Rev. Bd. 1984); *Cotton Broadcasting Company*, 60 Rad. Reg. 2d 92, 95 (P & F) (Rev. Bd. 1986) (where the Board only awarded a very slight coverage preference where an applicant served 118,000 more people).

[44] *Report, Order and Policy Statement Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179 (1986), *reconsideration denied*, 1 FCC Rcd 421 (1986).

time quantitative integration credit" and Rainbow a "90% full-time credit." 99 FCC 2d at 703. (Pet. App. 86a). Rainbow's quantitative advantage was insufficient to be decisional. 2 FCC Rcd at 1475. (Pet. App. 56a). Therefore, the Commission examined the parties' qualitative attributes, and the minority and female preferences were found dispositive. Metro prevailed on the local residence and civic participation qualitative attributes. However, after emphasizing that Rainbow had 90% hispanic ownership participation, whereas Metro had only one 19.8% principal who was black,[45] the Board concluded that "although the qualitative comparison between Rainbow and Metro is close, Rainbow's substantial minority preference, in conjunction with its slight female ownership advantage (5% vs. Metro's 0%) and solid broadcast experience preference, somewhat outweighs Metro's local residence and civic participation advantage." 99 FCC 2d at 704. (Pet. App. 88a). The Commission's subsequent denial of Metro's application for review (Pet. App. 62a) transformed the Review Board's Decision into that of the Commission, pursuant to Section 155 of the Communications Act. 47 U.S.C. § 155(c)(3).[46]

B. The Commission's Reexamination of Its Preferences in *Steele* and Remand of the Instant Case From the Lower Court

The Commission's race-, ethnic- and gender-based preference policies entered a state of flux following a challenge to the female preference in *Steele* v. *FCC*, 770 F.2d 1192 (D.C. Cir. 1985). In *Steele*, a panel held that "the Commission exceeded its authority under the Federal Communications Act by adopting a female preference in comparative broadcast proceedings." *Id.* at 1199. The D.C.

[45] *Metro Broadcasting, Inc.*, 99 FCC 2d at 704 (Rev. Bd. 1984).

[46] On remand, discussed *infra* at 17, the Commission acknowledged that, "absent credit for its minority and female integration, Rainbow would lose its qualitative advantage over Metro." Metro Broadcasting, Inc., 2 FCC Rcd at 1475. (Pet. App. 56a).

Circuit, sitting *en banc*, vacated the panel decision, granted rehearing, and called for rebriefing,[47] after the instant case had been briefed and awaited oral argument.

Before the *en banc Steele* court, the FCC submitted a motion for remand (S.J.A. 95) with its brief on the merits (S.J.A. 57), and concurrently released a *Public Notice*, FCC 86-387 (Sept. 15, 1986) (Pet. App. 106a), announcing its conclusions that both its gender and minority preference policies were indefensible on the record as it stood. In its brief, the Commission admitted that it "had neither constitutional authority nor statutory basis for the female preference," and requested remand for further consideration. (S.J.A. 76, 78). The Commission proclaimed in its motion for remand that "race, sex or national origin per se should not be a basis for licensing determinations," (S.J.A. 96), expressing its disbelief that "a sufficient foundation [existed] to satisfy statutory review requirements or the heightened scrutiny the Constitution requires of racial or gender based preferences." (S.J.A. 96). Through its *Public Notice*, the Commission announced that it would be "instituting a proceeding to collect evidence if allowable in light of the court's *en banc* action in *Steele*," *Public Notice* (Pet. App.107a), and reiterated that "racial and gender preferences are constitutionally suspect and before they can be imposed the agency must have an 'exceedingly persuasive justification.' "[48] *Id.* (Pet. App. 107a).

The *en banc Steele* court granted the FCC's request, remanding *Steele* "in order to permit the agency to reexamine the bases for its minority and female preference policies."[49] The record in this case was remanded for the same purpose,[50] and, in due course, the Commission, by

[47] *Steele* never reached an *en banc* circuit decision because the case subsequently was settled. *James U. Steele*, 4 FCC Rcd 4700 (1989).

[48] (citing *Mississippi University for Women* v. *Hogan*, 458 U.S. 718, 724 (1982)).

[49] *Metro Broadcasting, Inc.*, 3 FCC Rcd 866 (1988) (Pet. App. 48a).

[50] *Id.* The record in *Shurberg*, 876 F.2d 901, the case involving the Commission's distress sale policies, also was remanded at this time. 876 F.2d at 927 (MacKinnon, J., concurring in judgment).

Notice of Inquiry, opened MM Docket No. 86-484, encaptioned *Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications*, 1 FCC Rcd 1315 (1986), modified, 2 FCC Rcd 2377 (1987) (*Racial, Ethnic or Gender Classifications*, or *Inquiry*).

The Commission collected evidence from numerous parties regarding its minority and female preference policies but the *Inquiry* was doomed on December 22, 1987, when the President signed *House Joint Resolution 395* into law. *Racial, Ethnic or Gender Classifications*, 3 FCC Rcd 766 (1988); *Continuing Appropriations for Fiscal Year 1988 and for Other Purposes*, Pub. L. No. 100-102, 101 Stat. 1329 (1987) (*1988 Appropriations Act*).

C. Congressional Entrenchment of the Commission's Preference Policies and the Disposition of This Case by the Court of Appeals

The *1988 Appropriations Act*, which contained the funding legislation for fiscal year 1988, directed the FCC, *inter alia*, "to close MM Docket No. 86-484 with a reinstatement of prior policy" with respect to "minority and women ownership of broadcasting licenses . . . . " *1988 Appropriations Act*. (Pet. App. 100a). The Committee Report which resulted in this provision instructed the FCC to resolve, within 60 days, "all proceedings that have been remanded by the court of appeals . . . in a manner consistent with the policies that mandated incentives for minorities and women in broadcast ownership,"[51] specifically referencing the instant case.[52] Following the enactment of the *1988 Appropriations Act*, the Commission abandoned its *Inquiry*, decided all cases held in abeyance pursuant to its order therein, and began to reapply its race-, ethnic- and gender-based preferences in comparative proceedings. *E.g.*, *Faith Center, Inc.*, 3 FCC Rcd 868 (1988). The Commission also reactivated its earlier affirmance of the Review Board's Decision in this case, which awarded the Orlando construction permit to Rainbow on the basis of the minority and female preferences. *Metro Broadcasting, Inc.* 3 FCC Rcd 866. (Pet. App. 48a).

With *Racial, Ethnic or Gender Classifications* closed down, *Winter Park*, on Metro's motion, was recalled by the court of appeals, rebriefed, argued and decided. Between oral argument and decision, this Court decided *City of Richmond* v. *J.A. Croson Co.*, 109 S.Ct. 706 (1989) (*Croson*), which should have influenced the lower court's ruling. Recognizing this, Metro lodged a Supplemental Brief with the lower court.[53] However, Metro's motion for leave to file the brief was denied and the brief rejected. (Pet. App. 104a).

The court of appeals, in a split decision, upheld both the constitutionality of the Commission's preference policies, and the award of the Orlando construction permit to Rainbow. 873 F.2d at 349. (Pet. App. 2a). On September 18, 1989, Metro petitioned this Court for a writ of certiorari, which petition was granted on January 8, 1990. (J.A. 5).

SUMMARY OF ARGUMENT

The Commission's race-, ethnic- and gender-based preferences violate the equal protection component of the Due Process Clause for a number of reasons and in a number of ways. The minority preferences were developed by the FCC following two District of Columbia Circuit opinions—*TV 9*, 495 F.2d 929 and *Garrett*, 513 F.2d 1056—where

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[51] Rep. No. 100-182, 100th Cong., 1st Sess. (1987) (S.J.A. 54).

[52] *Id.* Similar language was incorporated into the appropriations legislation for fiscal years 1989, *Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act of 1989*, Pub. L. No. 100-459, 102 Stat. 2216 (December, 1988) (*1989 Appropriations Act*) (Pet. App. 101a), and 1990. *Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act of 1990*, Pub. L. 101-162, 103 Stat. 988 (November, 1989) (*1990 Appropriations Act*) (App. 1a).

[53] A copy of Metro's Supplemental Brief has been submitted to this Court.

the agency was reversed for not awarding "merit" for black ownership participation. In *TV 9*, the court held that "when minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should be awarded." 495 F.2d at 938. In *Garrett* the court said "black ownership and participation together are themselves likely to bring about programming that is responsive to the needs of the black citizenry . . . . " 513 F.2d at 1063. Merit meant nothing more than a plus-factor. *TV 9*, 495 F.2d at 941 n. 2.

The Commission on its own up-graded the plus-factor to a factor of "significant weight" in *Waters*, 91 FCC 2d 1260, 1267 (1982). It had no record before it on which to base this change of policy; indeed the opposite was true in that the comparative proceeding at hand was for an FM permit in western Michigan where there were few minorities. Ever since, the favoritism afforded for racial and ethnic status has been deemed a "preference," and is today at the top of the list—a very short list.

In 1978 the Review Board extended the minority preference to female applicants in *Mid-Florida Television Corp.*, 70 FCC 2d 281, for no other reason than "upon essentially the same basis as the merit given for black ownership and participation. *Id.* at 326. The female preference carries less weight than the minority preference, but how much less no one knows.

The foregoing scenario violates every conceivable equal protection tenet. Fostering of program diversity, where it is known by the Commission to already have been achieved in the marketplace, is neither a compelling nor an important governmental interest. The Commission has acknowledged candidly that the record as it currently exists bears no support for the preferences—they are not the remedial product of any prior discrimination by the FCC, nor is their purpose to remedy any kind of past discrimination. They rest on the unproven assumption that Hispanics are likely to program for Hispanics, blacks for blacks and women for women—all of which is absurd. The evidence

that does exist is that licensees are driven by market forces.

The only appropriate standard of review is that of "strict scrutiny," both for race/ethnicity and for gender. In addition to failing the compelling governmental interest test, the FCC's preferences fail the narrow tailoring test. They are open-ended as to time and application. Moreover, the "diversity" they are designed to promote is stereotyping, with no record to support it and bearing no relationship to student body diversity in the academic setting.

In 1982 Congress amended the Communications Act to provide that if the Commission were to employ lotteries as its selection process, minority preferences must be incorporated into the weighing process. Program diversity and underrepresentation were mentioned in the spartan legislative history. Gender was not the subject of the bill. In any event, the Commission has never adopted lotteries as its method of selecting winning applicants in full-power broadcast proceedings, making the lottery statute irrelevant herein. In 1987, in an appropriations bill, Congress defunded the Commission's first and only effort to determine whether a nexus exists between ownership composition and program diversity and required the FCC to restore its minority and gender preferences. However, appropriations measures are not entitled to the deference accorded substantive acts of Congress.

ARGUMENT

I. The FCC's Race-, Ethnic-, and Gender-Based Preference Policies Violate The Equal Protection Component Of The Due Process Clause Of The Constitution Of The United States Of America.

Although the *TV 9* majority was cautious to explain that it was not directing the FCC to adopt a "new comparative policy of awarding preferences for Black or minority ownership, per se," 495 F.2d at 941 and nn. 2, 3,[54] the me-

[54] *See also* discussion at p. 8, *supra*.

chanics of modern comparative selection assure that the original "plus factor" of preferential merit is dispositive in all but a few cases. First, preferential treatment was extended to women. Consequently, approximately 75% of the U.S. population—everyone with the exception of caucasian males[55]—currently is afforded strong preferential treatment for new broadcast opportunities. Second, the modest "plus factor" ordered by the *TV 9* court was elevated to "significant weight" in *Waters*, 91 FCC 2d at 1267, and subsequent licensing cases apply this formula. Third, through use of limited partnership equity or nonvoting stock,[56] applicants now may shield principals who do not propose to actively integrate into station management or those with other media interests from comparative consideration, offer token equity to minority and/or female principals so as to claim 100% minority and/or female ownership integration credit, and prevail easily over any nonpreferred applicant.[57] In sum, because both the diversification criterion and quantitative ownership integration factor may be neutralized by a perceptive applicant, the minority and/or female "enhancements" are, in most cases, all that remains for the FCC to consider in awarding a new broadcast station license.

The effect of these developments is that white male applicants seldom have prevailed in broadcast comparative contests in recent years, leading one veteran FCC administrative law judge to observe in 1984 that two applicants had "deluded themselves into believing white males can prevail in a standard comparative setting at this point in time." *Debra D. Carrigan*, 100 FCC 2d 741, 759-760 n. 23 (ALJ 1984).[58] Bearing out this cynicism is the fact that, in 51 of the 78 most recently reported commercial broadcast licensing cases, applicants said to be owned or controlled by minorities or females have prevailed in initial comparative decisions.[59] This appears to be not a "modest

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[55] When, to the female preference, there is added the preference for "Blacks, Hispanics, American Indians, Alaska Natives, and Pacific Islanders." *See* 47 U.S.C. § 309(i)(3)(c)(ii), P.L. 97-259, 96 Stat. 1087, and discussion at n.18, *supra*.

[56] *E.g., United American Telecasters, Inc.* v. *FCC*, 801 F.2d 1436 (D.C. Cir. 1986); *Pacific Television, Ltd.*, 2 FCC Rcd 1101 (Rev. Bd. 1987), *review denied*, 3 FCC Rcd 1700 (1988). *See also* discussion at pp. 11, 12, *supra*.

[57] *See* discussion at p. 13, *supra*.

[58] A female applicant ultimately prevailed in that case. *Debra D. Carrigan*, 100 FCC 2d 721 (Rev. Bd. 1985), *aff'd per judgment sub nom., Bernstein/Rein Advertising, Inc.* v. *FCC*, 830 F.2d 1188 (D.C. Cir. 1987).

[59] *Duane Tomko*, 2 FCC Rcd 206 (ALJ 1987) (minority); *Tulsa Broadcasting Group*, 2 FCC Rcd 1149 (ALJ 1987)(minority and female); *Magdalene Gunden Partnership*, 2 FCC Rcd 1223 (ALJ 1987) (minority and female); *Irving A. Uram*, 2 FCC Rcd 1710 (ALJ 1987) (white male); *Charles Ray Shinn*, 2 FCC Rcd 2234 (ALJ 1987) (white male); *Moore Broadcast Industries*, 2 FCC Rcd 2754 (ALJ 1987) (female); *James and Sharon Leon Sepulveda*, 2 FCC Rcd 2937 (ALJ 1987) (minority and female); *Dalton Television Associates, Ltd.*, 2 FCC Rcd 2940 (ALJ 1987) (minority); *Linda Crook*, 2 FCC Rcd 3511 (ALJ 1987) (female); *Armando Garcia*, 2 FCC Rcd 4166 (ALJ 1987) (minority); *Elijah Broadcasting Corp.*, 2 FCC Rcd 4468 (ALJ 1987) (white male); *Bogner Newton Corp.*, 2 FCC Rcd 4792 (ALJ 1987) (minority); *Washoe Shoshone Broadcasting*, 2 FCC Rcd 5362 (ALJ 1987) (minority and female); *Thompson Broadcasting of Battle Creek, Inc.*, 2 FCC Rcd 5926 (ALJ 1987) (white male); *Mark L. Wodlinger*, 2 FCC Rcd 6027 (ALJ 1987) (white male); *Hispanic Keys Broadcasting Corp.*, 2 FCC Rcd 6255 (ALJ 1987) (minority); *Religious Broadcasting Network*, 2 FCC Rcd 6561 (ALJ 1987) (minority and female); *Gali Communications, Inc.*, 2 FCC Rcd 6967 (ALJ 1987) (minority and female); *Priscilla L. Schwier*, 2 FCC Rcd 7153 (ALJ 1987) (white male); *Genese Communications, Inc.*, 2 FCC Rcd 7252 (ALJ 1987) (minority and female); *Progressive Communications*, 3 FCC Rcd 386 (ALJ 1988) (white male); *Northampton Media Associates*, 3 FCC Rcd 570 (ALJ 1988) (minority and female); *Elaine Eicher*, 3 FCC Rcd 812 (ALJ 1988) (female); *Catherine Juanita Henry*, 3 FCC Rcd 1492 (ALJ 1988) (minority and female); *UN2JC Communications (Limited)*, 3 FCC Rcd 2243 (ALJ 1988) (minority and female); *62 Broadcasting, Inc.*, 3 FCC Rcd 4429 (ALJ 1988) (minority and female); *Marlin Broadcasting of Central Florida, Inc.*, 3 FCC Rcd 4699 (ALJ 1988) (minority and female); *William S. Daugherty, III*, 3 FCC Rcd 4999 (ALJ 1988) (female); *Evangel Communications, Inc.*, 3 FCC Rcd 5421 (ALJ 1988) (white male); *Port Huron Family Radio, Inc.* 3 FCC Rcd 5562 (ALJ 1988) (white male); *Nirvana Radio Broadcasting Corp.*, 3 FCC Rcd 6038 (ALJ 1988) (white male); *JAM Communications, Inc.*, 3 FCC Rcd 6285 (ALJ 1988) (minority and female); *Key Broadcasting Corp.*, 3 FCC Rcd 6587 (ALJ 1988) (minority and female); *DLBS, Incorporated*, 3 FCC Rcd 6710 (ALJ 1988) (minority and female); *GNOL Broadcasting,*

plus," but a deck stacked in favor of those who fit certain racial, ethnic and/or gender classifications.

The invidiousness of this outcome and the governmental process at work to achieve it, directly implicate constitu-

Inc., 3 FCC Rcd 6796 (ALJ 1988) (white male); *Pontchartrain Broadcasting Company, Inc.*, 3 FCC Rcd 6800 (ALJ 1988) (minority and female); *The Baltimore Radio Show, Inc.*, 3 FCC Rcd 6823 (ALJ 1988) (minority and female); *Richard P. Bott, II*, 3 FCC Rcd 7094 (ALJ 1988) (white male); *William M. Piner*, 3 FCC Rcd 7101 (ALJ 1988) (minority and female); *Ramon Rodriguez & Associates*, 4 FCC Rcd 370 (ALJ 1989) (minority and female); *Beaux Bridge Broadcasters Limited Partnership*, 4 FCC Rcd 581 (ALJ 1989) (minority); *Corydon Broadcasters, Ltd.*, 4 FCC Rcd 1537 (ALJ 1989) (minority and female); *Community Broadcasting Company, Inc.*, 4 FCC Rcd 1986 (ALJ 1989) (female); *Berea Broadcasting Co., Inc.*, 4 FCC Rcd 2341 (ALJ 1989) (female); *Coastal Broadcasting Partners*, 4 FCC Rcd 2345 (ALJ 1989) (minority and female); *Salinas Broadcasting*, 4 FCC Rcd 2762 (ALJ 1989) (white male); *Renee Marie Kramer*, 4 FCC Rcd 2848 (ALJ 1989) (minority and female); *Rockledge Radio, Ltd.*, 4 FCC Rcd 3465 (ALJ 1989) (white male); *Charisma Broadcasting Corp.*, 4 FCC Rcd 4018 (ALJ 1989) (minority and female); *Perry Television, Inc.*, 4 FCC Rcd 4063 (ALJ 1989) (minority); *John Jay Iselin*, 4 FCC Rcd 4622 (ALJ 1989) (white male); *Aspen FM, Inc.*, 4 FCC Rcd 4462 (ALJ 1989) (white male); *George Henry Clay*, 4 FCC Rcd 4564 (ALJ 1989) (minority); *Weyburn Broadcasting Limited Partnership*, 4 FCC Rcd 5310 (ALJ 1989) (minority and female); *Global Information Technologies, Inc.*, 4 FCC Rcd 5445 (ALJ 1989) (female); *Radio Delaware, Inc.*, 4 FCC Rcd 5555 (ALJ 1989) (female); *Anchor Broadcasting, Limited Partnership*, 4 FCC Rcd 5687 (ALJ 1989) (minority); *Shaun Phalen*, 4 FCC Rcd 5714 (ALJ 1989) (female); *J.T. Parker Broadcasting Corp.*, 4 FCC Rcd5729 (ALJ 1989) (white male); *Colonial Communications, Inc.*, 4 FCC Rcd 5969 (ALJ 1989) (female); *Julia S. Zozaga*, 4 FCC Rcd 6271 (ALJ 1989) (white male); *Poughkeepsie Broadcasting Limited Partnership*, 4 FCC Rcd 6453 (ALJ 1989) (minority); *Rayne Broadcasting Co., Inc.*, 4 FCC Rcd 6760 (ALJ 1989) (minority and female); *Inlet Broadcasting, Co.*, 4 FCC Rcd 6760 (ALJ 1989) (white male); *Advanced Broadcast Technologies, Inc.*, 4 FCC Rcd 6821 (ALJ 1989) (white male); *Ronald Sorenson*, 4 FCC Rcd 6961 (ALJ 1989) (white male); *Don H. Barden*, 4 FCC Rcd 7043 (ALJ 1989) (minority and female); *Adlai E. Stevenson IV*, 4 FCC Rcd 7153 (ALJ 1989) (white male); *Ocean Pines LPB Broadcast Corp.*, 4 FCC Rcd 7767 (ALJ 1989) (white male); *Pueblo Radio Broadcasting Service*, 4 FCC Rcd 7082 (ALJ 1989) (minority); *Carta Corporation*, 4 FCC Rcd 7973 (ALJ 1989) (minority); *Richardson Broadcasting Group*, 4 FCC Rcd 7989 (ALJ 1989) (minority); *Sarasota-Charlotte Broadcasting*

tional prohibitions. The Equal Protection Clause of the Fourteenth Amendment commands that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws,"[60] a directive that all persons similarly situated must be treated alike. *City of Richmond* v. *Croson*, 109 S.Ct. 706, 712 (1989) (Croson) (O'Conner, J., plurality opinion); *Cleburne* v. *Cleburne Living Center*, 473 U.S. 432, 439 (1985); *Plyler* v. *Doe*, 457 U.S. 202, 216 (1982). The Due Process Clause of the Fifth Amendment[61] requires that the Federal Government guarantee to its citizens the same equal protection.[62] Pursuant thereto, any governmental distinction among groups or individuals must be justifiable. *Fullilove* v. *Klutznick*, 448 U.S. 448, 496 (1980) (Powell, J., concurring); *Cleburne*, 473 U.S. at 470 (Marshall, J., joined by Brennan, J., and Blackmun, J., concurring in part and dissenting in part). Equality under the law is denied where, as here, government classifies so

Corp., 4 FCC Rcd 8106 (ALJ 1989) (female); *Rebecca L. Boedker*, 4 FCC Rcd 8328 (ALJ 1989) (white male); *Rem Malloy Broadcasting*, 4 FCC Rcd 8423 (ALJ 1989) (minority); *WCVQ, Inc.*, 4 FCC Rcd 8554 (ALJ 1989) (minority and female); *Albert F. Gary*, FCC 90D-1 (ALJ released Jan. 22, 1990) (white male); *Silver Springs Communications*, FCC 90D-4 (ALJ released Jan. 24, 1990) (minority and female); *Mid-Ohio/Capital Communications, Limited Partnership*, FCC 90D-2 (ALJ released Jan. 24, 1990) (white male). Note that where a winning applicant had minority or female principals without a controlling interest, the applicant was tallied as "white male" hereinabove. Thus, the number of awards to applicants with minority and/or female participation is even greater.

[60] U.S. Const. amend XIV (emphasis added).

[61] The Fifth Amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend V. (Pet. App. 100a).

[62] *E.g.*, *Rostker v. Goldberg*, 453 U.S. 57 (1981); *Vance* v. *Bradley*, 440 U.S. 93, 95 n. 1 (1979); *Davis* v. *Passman*, 442 U.S. 228, 234 (1979); *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 367 n. 43 (1978); *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 100 (1976); *Buckley* v. *Valeo*, 424 U.S. 1, 93 (1976); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 638 n. 2 (1975) (*Wisenfeld*); *Cruz* v. *Hauck*, 404 U.S. 59, 63 n. 10 (1971); *Schneider* v. *Rusk*, 377 U.S. 163, 168 (1964); *Bolling* v. *Sharpe*, 347 U.S. 497, 500 (1954).

as to distinguish, in rules or programs, between persons who should be regarded as similarly situated.[63]

The Commission's race-based preference gnaws at the heart of the Constitution's equal protection pledge. A "core purpose" of both the Fourteenth and Fifth Amendments, is to "do away with all governmentally imposed discriminations based on race." *Wygant* v. *Jackson Board of Education*, 476 U.S. 267, 277 (1986) (Powell, J., plurality opinion); *Palmore* v. *Sidoti*, 466 U.S. 429, 432 (1984). This is because "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality,"[64] and "are irrelevant to almost every governmental decision."[65] The Commission's preferences for other minority groups similarly offend constitutional principles; the Equal Protection Clause disfavors classifications based upon ethnicity and national origin,[66] as well as race. And, the Commission's female preference policy tests this Court's prior determinations that, because "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth,"[67] governmentally imposed gender-based classifications endanger the equal

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[63] TRIBE, AMERICAN CONSTITUTIONAL LAW 993 (1978).

[64] *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978) (*Bakke*) (Powell, J., plurality opinion) (citing *Hirabayashi* v. *United States*, 320 U.S. 81, 100 (1943)).

[65] *Fullilove*, 448 U.S. at 496 (Powell, J., concurring); *Anderson* v. *Martin*, 375 U.S. 399, 402, 404 (1964).

[66] *E.g.*, *Strauder* v. *West Virginia*, 100 U.S. 303, 308 (1880); *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886); *Truax* v. *Raich*, 239 U.S. 33, 41 (1915); *Hernandez* v. *Texas*, 347 U.S. 475 (1954). As the Court stated in *Yick Wo*, the guarantees of equal protection "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws." 118 U.S. at 369.

[67] *Frontiero* v. *Richardson*, 411 U.S. 677, 686 (1973) (Brennan, J., joined by Douglas, J., White, J., and Marshall, J.)

protection guarantees of the Fifth and Fourteenth Amendments.[68]

These concerns are not dispelled because the Commission's race-, ethnic-, and gender-based classifications operate against a group that historically has not been subjected to governmental discrimination. *E.g.*, *Wygant*, 273 U.S. at 267; *Mississippi University for Women*, 458 U.S. at 724 n. 9 (1982); *Bakke*, 438 U.S. at 291, 295; *Casteneda* v. *Partida*, 430 U.S. 482, 499-500 (1977); *id.* at 501 (Marshall, J. concurring). Serious problems of justice are connected with the idea of preference itself;[69] "advancement sanctioned, sponsored or approved by the State should ideally be based on individual merit or achievement, or at the least on factors within the control of an individual."[70] Nor does the fact that the Commission's preferences emanate from the Federal Government, rather than a State, quell concern; the standards of equal protection applicable to the Federal Government under the Fifth Amendment are the same as those applied to state and local governments under the Fourteenth.[71]

Selection of an appropriate equal protection review standard here, however, is problematic. The members of this Court have yet to agree upon the standard of review required for race-based preferences and set-asides, although the Court has acknowledged that race-based re-

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[68] *E.g.*, *Mississippi University for Women*, 458 U.S. at 722; *Michael M.* v. *Superior Court of Sonoma County*, 450 U.S. 464 (1981); *Craig* v. *Boren*, 429 U.S. 190 (1976); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975); *Frontiero*, 411 U.S. 677; *Reed* v. *Reed*, 404 U.S. 71 (1971).

[69] *Bakke*, 438 U.S. at 298 (Powell, J. plurality opinion).

[70] *Id.* at 360-361 (Brennan, J., joined by White, J., Marshall, J., and Blackmun, J., concurring in part and dissenting in part).

[71] *E.g.*, *Buckley*, 424 U.S. 93 (per curiam); *Fullilove*, 448 U.S. at 523 n. 1 (Marshall, J. dissenting); *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Committee*, 488 U.S. 522, 543 n. 21 (1987); *Wiesenfeld*, 420 U.S. at 638 n. 2 (1975).

medial action sometimes is permissible. Moreover, this Court's reluctance to enunciate a definitive standard of review for gender-based preference classifications creates special problems herein, where the FCC's gender and minority preferences often compete against one another for broadcast privileges. Application of the prevailing separate standards for minority and gender-based classifications in this case could result in invalidation of one preference policy and proliferation of another, leading only to a shift in preference classifications as new groups attempt to demonstrate their similarity to the "validated" and preferred group. Additionally, prior "affirmative action" cases have analyzed preferential treatment only against purported remedial goals, whereas the Commission's preference classifications have no remedial basis. Finally, although this Court's recent cases have treated preferences and set-asides established by Congress and State or local governments, the Court has not articulated a review standard applicable to classifications instituted and applied by federal agencies. These difficulties may be surmounted, however, by this Court's unanimous adoption of a "strict scrutiny" standard of review for the FCC's racial, ethnic and female preference policies.

A. Strict Scrutiny Should Be Adopted As The Standard Of Equal Protection Review Appropriate For Race-, Ethnic-, And Gender-Based Classifications Which Are Imposed And Administered By The Judiciary Or Federal Administrative Agencies.

This Court has recognized that, although equal protection principles strongly prohibit government-drawn distinctions between individuals or groups solely on the basis of race,[72]

[72] Bakke, 438 U.S. at 291 (Powell, J., joined by White, J., plurality opinion) ("[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."); *Wygant*, 476 U.S. at 313 (Stevens, J., dissenting) ("[t]he Equal Protection Clause absolutely prohibits the use of race in many governmental contexts."); *Fullilove*, 448 U.S. at 523 (Stewart, J., dissenting) ("any official action that treats a person differently on account of his race or ethnic origin

racial and ethnic classifications sometimes are "relevant to the one legitimate state objective of eliminating the pernicious vestiges of past discrimination"[73] where such discrimination has been identified.[74] Similarly, "in limited circumstances," a gender-based classification favoring one sex can be justified if it "intentionally and directly assists members of the sex that is disproportionately burdened,"[75] and "if members of the gender benefited by the classification actually suffer a disadvantage related to the classification."[76] These limited exceptions to the Constitution's unwavering equal protection guarantees necessarily mean

is inherently suspect and presumptively invalid"); *Cleburne*, 473 U.S. at 471 (Marshall, J., joined by Brennan, J., and Blackmun, J., concurring in part and dissenting in part) ("[the] Fourteenth Amendment ... prohibits castes created by law along racial or ethnic lines"); *Croson*, 109 S.Ct. at 734 (Kennedy, J., concurring in part) ("[t]he moral imperative of racial neutrality is the driving force of the Equal Protection Clause."); *id.* at 73 (Scalia, J., concurring) ("discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society) (quoting A. BICKEL, THE MORALITY OF CONSENT 133 (1975)).

[73] *Wygant*, 267 U.S. at 301 (Marshall, J., dissenting).

[74] *Accord, Croson*, 109 S.Ct. at 720 (O'Conner, J., joined by Rehnquist, C.J., and White, J., plurality opinion) ("Classifications based on race carry a danger of stigmatic harm. Unless they are reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility"); *id.* at 734-735 (Kennedy, J., concurring in part); *id.* at 737 (Scalia, J., concurring); *Wygant*, 476 U.S. at 274 (Powell, J., joined by Rehnquist, C.J., and O'Conner, J., plurality opinion). *But see Croson*, 109 S.Ct. at 730 (Stevens, J., concurring in part) ("I therefore do not agree with the premise ... that a governmental decision that rests on a racial classification is never permissible except as a remedy for a past wrong."); *id.* at 735 (Scalia, J., concurring) ("I do not agree ... that, despite the Fourteenth Amendment, state and local governments may in some circumstances discriminate on the basis of race in order (in a broad sense) to ameliorate the effects of past discrimination.").

[75] *Mississippi University for Women*, 458 U.S. at 728 (1982) (O'Conner, J., joined by Brennan, J., White, J., Marshall, J, and Stevens, J., majority opinion). *See also, Schlesigner* v. *Ballard*, 419 U.S. 498 (1975).

[76] *Mississippi University for Women*, 458 U.S. at 728 (O'Conner, J., joined by Brennan, J., White, J., Marshall, J., and Stevens, J., majority opinion). *See also Califano* v. *Webster*, 430 U.S. 313 (1977).

that innocent parties must share some burdens caused by prior discrimination.[77] However, such "innocent parties" are not required to sacrifice their own constitutional rights to equal protection; the standard of review under the Equal Protection Clause is not dependent on the race or gender of those burdened or benefitted by a particular classification.[78] Unfortunately, however, the Court has not reached firm agreement upon the standard of equal protection review applicable to either minority- or gender-based preference classifications.[79]

The recent decision in *Croson*, 109 S.Ct. 106, marks the first time that a majority of the members of this Court have announced that race- and ethnic-based classifications, whether purportedly remedial or benign, must be subjected to strict judicial scrutiny.[80] To survive strict scrutiny anal-

[77] *E.g.*, *Fullilove*, 448 U.S. at 484 (Burger, C.J., joined by White, J., and Powell, J., plurality opinion).

[78] *Croson*, 109 S.Ct. at 721 (O'Conner, J., plurality opinion); *Wygant*, 476 U.S. at 279-28- (O'Connor, J., concurring); *Fullilove*, 448 U.S. at 515 (Powell, J., concurring); *id.* at n. 13 (Powell, J., concurring) ("the United States may not employ unconstitutional classifications, or base a decision upon unconstitutional considerations, when it provides a benefit to which a recipient is not legally entitled."); *Mississippi University for Women*, 458 U.S. at 724 n. 9 (O'Connor, J., joined by Brennan, J., White, J., Marshall, J., and Stevens, J., majority opinion). *See also*, *Califano* v. *Goldfarb*, 430 U.S. 199, 210-212 (1977) (opinion of Brennan, J.); *Richardson* v. *Belcher*, 404 U.S. 78, 81 (1971) ("To characterize an Act of Congress as conferring a 'public benefit' does not, of course, immunize it from scrutiny under the Fifth Amendment"); *Shelley* v. *Kraemer*, 334 U.S. 1, 22 (1948); A. BICKEL, THE MORALITY OF CONSENT 133 (1975).

[79] *Croson*, 109 S.Ct. at 743 (Marshall, J., joined by Brennan, J., and Blackmun, J., dissenting) ("Agreement upon a means for applying the Equal Protection Clause to an affirmative-action program has eluded this Court every time the issue has come before us.").

[80] *Croson*, 109 S.Ct. at 721 (O'Connor, J., joined by Rehnquist, C.J., and White, J., plurality opinion) ("Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race . . . "); *id.* at 734 (Kennedy,

ysis, (1) a racial or ethnic classification must be justified by a "compelling governmental interest," and (2) the means chosen by the governmental unit to effectuate its purpose must be "narrowly tailored." *Wygant*, 476 U.S. at 274, 285; *Croson*, 109 S.Ct. at 721-722 (quoting *Wiesenfeld*, 420 U.S. at 648 (1975).[81] Whereas, consensus largely has been reached regarding the tests for race- and ethnic- based classifica-

J., concurring in part) ("I accept the less absolute rule . . . that any racial preference must face the most rigorous scrutiny by the courts."); *id.* at 735 (Scalia, J., concurring) ("I agree . . . that strict scrutiny must be applied to all governmental classification by race, whether or not its asserted purpose is 'remedial' or 'benign.' "); *id.* at 752 (Marshall, J., joined by Brennan, J., and Blackmun, J., dissenting) ("Today for the first time, a majority of this Court has adopted strict scrutiny as its standard of Equal Protection Clause review of race-conscious remedial measures . . . . This is an unwelcome development.").

[81] A plurality of the Court believe that, whereas, strict scrutiny is warranted where racial classifications are "drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separatism," racial classifications drawn for remedial purposes (1) must serve important governmental objectives, and (2) must be substantially related to achievement of those objectives, in order to withstand constitutional scrutiny. *Croson*, 109 S.Ct. at 743 (Marshall, J., joined by Brennan, J.,and Blackmun, J., dissenting). Justice Stevens employs another approach, couched in "rational basis" terms:

> In my own approach to these cases, I have always asked myself whether I could find a rational basis for the classification at issue. The term "rational basis" . . . includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class . . . . In every equal protection case, we have to ask certain basic questions. What class is harmed by the legislation, and has it been subjected to a tradition of disfavor by our laws? What is the characteristic of the disadvantaged class that justifies the disparate treatment? In most cases the answer to these questions will tell us whether the statute has a "rational basis." The answers will result in the virtually automatic invalidation of racial classifications and in the validation of most economic classifications . . .
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> *Id.* at 732 (quoting *Cleburne*, 473 U.S. at 452-453 (1985) (Stevens, J., concurring).

tions, however, this Court has been hesitant to establish a definitive review standard for classifications based upon gender.[82] In *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), the Court used strict scrutiny to invalidate a federal statute preventing a military servicewoman from claiming her spouse as a "dependent" for the purposes of obtaining increased quarters allowances and medical and dental benefits. *Id.* at 682 (Brennan, J., joined by Douglas, J., White, J., and Marshall, J., plurality opinion).[83] However, in subsequent cases, the Court has declined to either apply strict scrutiny review in gender cases or proclaim that strict scrutiny ever applies in such cases, instead applying heightened, or intermediate scrutiny to all gender-based classifications.[84] To survive intermediate scrutiny, the party seeking to uphold a law or policy which classifies individuals on the basis of gender carries the burden of showing an "exceedingly persuasive justification" for the classification.[85] This burden may be met only by showing that (1) the classification serves important governmental objectives, and (2) the discriminatory means employed are substantially related to the achievement of those objectives. *Mississippi University for Women*, 458 U.S. at 724.[86]

The Court should apply identical equal protection review standards to both the minority and female preference policies at issue in the instant case.[87] The rationale for applying

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[82] In *Mississippi University for Women*, 458 U.S. at 724, the Court stated "[b]ecause we conclude that the challenged statutory classification is not substantially related to an important objective, we need not decide whether classifications based upon gender are inherently suspect."

[83] *See also*, *Kahn* v. *Shevin*, 416 U.S. 351, 357 (1974) (Brennan, J., joined by Marshall, J., dissenting).

[84] *E.g.*, *Michael M.*, 450 U.S. 464 (1981); *Mississippi University for Women*, 458 U.S. 718 (1982).

[85] *E.g.*, *Mississippi University for Women*, 458 U.S. at 724; *Kirchberg* v. *Feenstra*, 450 U.S. 455, 461 (1981).

[86] This test is the same test as that advocated by the minority in *Croson* for remedial race-based classifications. See note 81, *supra*.

[87] This will not be difficult for a minority of this Court who apply the same two-pronged equal protection test to gender-based preferences and race-based remedial measures. *See* note 86, *supra*. However, even those Justices apparently would apply a stricter standard to the Commission's policies upon a determination that the policies are not remedial in nature. *Id.* In that event, the stricter standard should be applied to both classifications for the reasons stated herein.

an intermediate review standard to gender-based classifications, that "the sexes are not similarly situated in certain circumstances,"[88] is wholly absent herein. Although the Equal Protection Clause does not "require things which are different in fact . . . to be treated in law as though they were the same,"[89] it clearly requires such treatment for those similarly situated, which applicants for FCC broadcast licenses are. Thus, a determination that strict scrutiny review applies to gender-based classifications which appear facially unrelated to inherent differences among the sexes would bridge, rather than undermine this Court's prior precedents.

Second, rationales frequently used to justify intermediate level scrutiny for gender-based classifications are fallacious when applied to this case. For example, Justice Powell, in *Bakke*, attempted to justify the separate standards in dicta, saying "[g]ender-based distinctions are less likely to create the analytical and practical problems present in preferential programs premised on racial or ethnic criteria . . . [t]here are no rival groups which can claim that they too are entitled to preferential treatment." *Bakke*, 438 U.S. at 303. However, this is not true here, where females, and other classified minorities must compete for FCC preferences;[90]

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[88] *E.g.*, *Parham* v. *Hughes*, 441 U.S. 347, 354 (1979) (Stewart, J., plurality opinion); *Califano* v. *Webster*, 430 U.S. 313 (1977); *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975); *Kahn* v. *Shevin*, 416 U.S. 351 (1974). As the Court has stated, a legislature may "provide for the special problems of women." *Wiesenfeld*, 420 U.S. at 653 (1975).

[89] *E.g.*, *Rinaldi* v. *Yeager*, 384 U.S. 305, 309 (1966).

[90] In fact, comparative licensing cases often come down to an unseemly squabble pitting females against minorities, *see, e.g.*, *Santee Cooper Broadcasting Company of Hilton Head, Inc.*, 99 FCC 2d 781, 804-805 (Rev. Bd. 1984)(subsequent history omitted), or one racial minority against another minority, *e.g.*, *Religious Broadcasting Network*, 3 FCC Rcd 4085

it can only be true where the classifications are based upon factual distinctions between male and female biology and makeup.

Third, the failure of this Court to invoke a uniform standard of equal protection review prior to commencing review under the intermediate standard[91] could result in a scenario in which the female preference is upheld and the minority preferences are not. As Justice Powell observed with respect to minority enhancements in *Bakke*, "the difficulties entailed in varying the level of judicial review according to a perceived 'preferred' status of a particular . . . minority are intractable . . . [t]hose whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications at the expense of individuals belonging to other groups." 438 U.S. at 265. This would be the result of a disposition of this case in which females remain preferred but minorities do not.[92] Accordingly, this Court should apply strict scrutiny review to both classifications.

This Court also should adopt strict scrutiny as the standard applicable to federal administrative agencies and the judiciary.[93] Deferential review already has been extended to

(Rev. Bd. 1988)(Black and Hispanic applicants decry preference for Asians seeking New Jersey TV license); *New Continental Broadcasting Co.*, 88 FCC 2d 830, 844-845 (Rev. Bd. 1981)(applicant seeks higher preference for Black ownership than for Hispanic ownership). The Commission even had one case in which a party claimed a preference for "sexual orientation." *Ronald Sorenson*, 4 FCC Rcd 6961 (ALJ 2989).

[91] As has been the preferred course for this Court in the wake of *Stanton* v. *Stanton*, 421 U.S. 7, 13 (1975).

[92] *See* note 90, *supra*.

[93] This Court's recent affirmative action cases do not set forth the equal protection standards applicable to the federal judiciary (which established the FCC's preference classifications), or federal administrative agencies. *Fullilove* examined racial classifications imposed by Congress, discussing the standard of equal protection review applicable to congressional race-based remedial measures enforced against the States, and the degree to which Congress may exercise its unique remedial powers under Section 5 of the Fourteenth Amendment. *Fullilove*, 448 U.S. at 472-92

certain Acts of Congress, pursuant to its unique Fourteenth Amendment powers.[94] The application of strict scrutiny to State and local classifications also is premised upon the Fourteenth Amendment. The failure to apply at least heightened review to policies promulgated by courts and federal agencies would rob the Due Process Clause of the Fifth Amendment, which restrains federal equal protection violations, of any substantive meaning. Regardless of which test is applied, however, the Commission's minority and female preference policies cannot pass constitutional muster.

B. The Commission's Minority And Female Preference Policies Cannot Survive Strict Scrutiny, Or Any Less Stringent Standard Of Equal Protection Review.

The disparities between the strict scrutiny equal protection test applied by the Croson majority to race- and ethnic-based classifications, and the tests applied by Justices Brennan, Marshall and Blackmun, in the case of race-based remedial measures, and additional members of the Court, with respect to gender-based classifications, do not preclude a fair measure of consensus.[95] As Justice O'Connor has noted, "as regards certain state interests commonly relied upon in formulating affirmative action programs, the distinction between a 'compelling' and an 'important' governmental purpose may be a negligible one." *Wygant*, 476 U.S. at 286. Moreover, although the "narrow tailoring" required by strict scrutiny analysis undoubtedly is more stringent than the requirement that classifications be "substantially related" to the achievement of their purposes, the lack of any nexus between objective and remedy within the Com-

(Burger, C.J., writing for the plurality). *Wygant*, and the more recent *Croson*, shed light on the disposition of cases in which race-based remedies are imposed by a state or local government without evidence of identified past discrimination, and enunciate criteria for properly tailoring race-based remedies where evidence of such identified discrimination is present. *Webster* v. *Reproductive Health Services*, 109 S.Ct. 3040, 3064 (1989) (Scalia, J., concurring in part).

[94] *Fullilove*, 448 U.S. 448. *See* discussion, *infra* at pp. 47, 49.

[95] *Wygant*, 476 U.S. at 286 (O'Connor, J., concurring).

mission's preference scheme subverts any conclusion that the FCC's policies have even a rational basis. Accordingly, the Commission's preferences are hard-pressed for support under any of the considerations normally deemed relevant under the Fifth and Fourteenth Amendments.

1. The FCC's Race-, Ethnic- and Gender-Based Preference Classifications Do Not Further A Compelling Or Important Governmental Interest.

The Federal Government has a compelling or important interest in remedying past discrimination and its lingering effects. *E.g.*, *Wygant* 476 U.S. at 286; *Mississippi University for Women*, 458 U.S. at 728. Several members of the Court hold that *only* remedial purposes justify the use of race- and ethnic-based preference classifications.[96] Additionally, although its application remains untested, the Court has suggested that a state interest in the promotion of racial diversity is sufficiently compelling to support use of racial considerations within the context of higher education. *Bakke*, 438 U.S. at 311-15; *Wygant*, 476 U.S. at 286. And, Justice O'Connor offerred in *Wygant* that additional interests might be accepted:

> [N]othing the Court has said today necessarily forecloses the possibility that the Court will find other governmental interests which have been relied upon in the lower courts but which have not been passed on here to be sufficiently "important" or "compelling" to sustain the use of affirmative action policies. *Id.*

The FCC's program diversity rationale, however, should not be so sanctioned by this Court.

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[96] *See* discussion at note 74, *supra*. Justice Stevens, however, would permit non-remedial race-based classifications under certain circumstances, whereas Justice Scalia disfavors all classifications based on race, regardless of benign or remedial purpose. *Id.*

a. Program Diversity Is Not A Compelling Or Important Governmental Interest So As To Justify The Commission's Preference Classifications.

The sole stated purpose of the Commission's minority and female preference scheme is to foster diverse broadcast programming, a goal said to be premised upon the First Amendment value "that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *West Michigan Broadcasting Co.* v. *FCC*, 735 F.2d 601, 614 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985) (quoting *1965 Policy Statement*, 1 FCC 2d at 394 n. 4). The preferences were designed to "enhance program diversity by increasing ownership of stations by significant groups that are substantially underrepresented . . . ." *FCC Brief in Winter Park* at 47 (quoted in *Winter Park*, 873 F.2d at 357 (Williams, J., dissenting). (Pet. App. 19a). The Commission has emphasized that its pursuit of "program diversity," is the underpinning of the classifications here attacked, rather than any remedial rationale.[97]

Program diversity would not appear to be an important or compelling governmental interest so as to justify distinctions which are repugnant to established equal protection principles. The concept itself is amorphous, undefined even by its proponent. As Judge Williams pointed out, "[n]o party here has offered a definition of minority programming that is empirically verifiable . . . ." 873 F.2d at 358. (Pet. App. 22a). Ergo, the lack of a clear definition of program diversity hampers any conclusion that its accomplishment is "important" or "compelling."

To the extent that program diversity is definable, the acknowledged non-remedial nature of the goal directly re-

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[97] *See Winter Park*, 873 F.2d at 356 (Pet. App. 17a-18a); *FCC Brief in Winter Park* at 30 ("The FCC's goal in implementing the preference policy, however, has not been to remedy prior discrimination against minorities or to provide remedial benefits."); *FCC Steele Brief* at 18 (S.J.A. 81) ("There has never been a finding, nor so far as we know even an allegation, that the FCC engaged in prior discrimination against racial minorities or women in its licensing process.") (S.J.A. 81).

sults in stigmatic harm to the groups which "benefit."[98] As the origins of the concept reveal, program diversity is tantamount to organized, governmental stereotyping. The rationale is premised on the idea, first presented in *TV 9*, 495 F.2d at 938, and *Garrett*, 513 F.2d at 1063, that diversity of station ownership will bring about diversity of programming. *See Winter Park*, 873 F.2d at 363 (Williams, J., dissenting) (Pet. App. 32a-33a). The underlying assumption is the "reasonable expectation" that minority or female owners will program their new broadcast stations in some sort of minority or female manner.[99] Under the Commission's theory, race, ethnicity and gender not only determine what type of programming station owners want to provide, but also what viewers and listeners want to hear. *Winter Park*, 873 F.2d at 358 (Pet. App. 21a). Such "stereotypical analysis . . . is the hallmark of violations of the Equal Protection Clause." *Croson*, 109 S.Ct. at 732 (Stevens, J., concurring in part). Justice Powell warned in *Bakke*, that "[p]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relation to individual worth." 438 U.S. at 298. The Commission's preferences, based entirely on what are deemed predictable traits inherent in minority and female personalities, render this concern paramount.[100] The perpetuation of stereotypes in the name of program diversity cannot be a compelling or important governmental interest.

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[98] *See Croson*, 109 S.Ct. at 721 (O'Connor, J., plurality opinion) ("Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.")

[99] *TV 9*, 495 F.2d at 938 ("Reasonable expectation, not advance demonstration, is a basis for merit to be accorded relevant factors.").

[100] Other members of this Court have expressed similar concerns. *See Croson*, 109 S.Ct. at 745 (Marshall, J., joined by Brennan, J. and Blackmun, J., dissenting) ("we have required that government adduce evidence that, taken as a whole, is sufficient to support its claimed interest and to dispel the natural concern that it acted out of mere 'paternalistic stereotyping,' not on a careful consideration of modern social conditions.").

Further, program diversity would not appear a compelling or important governmental interest because the government neither can ensure nor enhance it: the marketplace does that. And, the marketplace apparently is working. The Commission itself concluded in *Deregulation of Radio*,[101] that "all types of minority needs, be they racial, ethnic or taste, can be and indeed are being well met through increasing the number of stations." *Id.* at 1068. Currently, there are a "significant number of over-the-air television and radio voices [which] insure the presentation of diverse opinions on issues of public importance." *Fairness Doctrine*, 102 FCC 2d 143, 202, 208 (1985). As the Commission has explained:

> [L]icensees have come to the conclusion that, even where the group appealed to has traditionally had a low income or is low in number, market-place forces make the provision of radio service to these segments of the community a rational economic decision. *Id.*

The FCC reached similar conclusions in *Commercial TV Stations*, 98 FCC 2d 1076 (1984), *reconsideration denied*, 104 FCC 2d 357 (1986), *aff'd*, *Action for Children's Television v. FCC*, 821 F.2d 741 (D.C. Cir. 1987). Accordingly, even were program diversity a valid governmental interest, it could not be "important" or "compelling" because the entity advancing the interest believes it already has been, and is being, achieved.

b. The Bakke Diversity Rationale Should Not Be Extended Beyond The Academic Context.

The FCC's adoption of the program diversity rationale to support its preference classifications has resulted in speculation regarding possible connections between the Commission's minority and female ownership promotion policies and the idea, first advanced in *Bakke*, that the pursuit of academic diversity is a compelling governmental interest.

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[101] 84 FCC 2d 968, *reconsideration denied*, 87 FCC 2d 797 (1981), *aff'd in part and rev'd in part*, *Office of Communication of the United Church of Christ* v. *FCC*, 707 F.2d 1413 (D.C. Cir. 1983).

The lower court, basing its constitutional determination almost entirely upon its earlier holding in *West Michigan*, 735 F.2d 601,[102] did not undertake an independent review of the program diversity goal. Instead, the *Winter Park* majority relied upon *West Michigan*'s conclusion that because consideration of minority status was but "one factor in a competitive multi-factor selection system designed to obtain a diverse mix of broadcasters," 735 F.2d at 613, the policies were validated under Justice Powell's hypothetical use of race as a factor in educational admissions for the purpose of obtaining diverse student bodies. *Winter Park*, 873 F.2d at 356 (Pet. App. 17a-18a). Both the *West Michigan* and *Winter Park* courts treated the FCC's diversity goal as virtually identical to the objective embraced by Justice Powell in *Bakke*.

The program diversity rationale embraced by the Commission and the academic diversity objective outlined by Justice Powell in *Bakke* would not appear interchangeable. The differing contexts from which the two goals arise would seem to render meaningful comparison impossible. For example, Justice Powell found academic diversity tied to the notion of academic freedom. *Bakke*, 438 U.S. at 313. A university's First Amendment freedom to select and create a diverse student body is important for exposing students to the "atmosphere of 'speculation, experiment and creation'. . . essential to the quality of higher education." *Id.* at 323. This goal would not seem to have a counterpart in the Commission's race-, ethnic- and gender-based preference policies.

A second flaw in comparing the FCC's preference awards with the multi-factored selection system theoretically approved in *Bakke* for university admissions is that the FCC preference factors, unlike those encouraged by Justice Powell, are dispositive of the outcome in most comparative cases.[103]

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[102] *Winter Park*, 873 F.2d at 349 (Pet. App. 2a) (Edwards, J., majority opinion) ("[t]his case is clearly controlled by *West Michigan*.").

[103] *See* discussion *supra*, at pp. 21-25.

A significant distinction between the academic diversity rationale and the Commission's program diversity goal is that pursuit of academic diversity in the manner advocated by Justice Powell breaks down racial stereotypes, whereas the Commission's pursuit of program diversity through minority and female ownership promotion fosters them. As Judge Williams noted, "[e]thnic diversity in the classroom enables those present to see individual members of ethnic groups as they are. Far from depending on some link between race and conduct, it is a potent device against ethnic stereotyping." 873 F.2d at 357. (Pet. App. 21a). By contrast, the Commission's policies not only promote stereotypes, but also *segregation*; the preferences assume greater weight under the best practicable service criterion as minority or female participation in applicants increases. The policies thus encourage minority or female applicants to join forces, lest non-minority principals weaken their comparative standings. The result is like a segregation of the airwaves in which discrete groups of minority broadcasters are prompted to cling together to broadcast the type of programming expected by the Commission.

Numerous contrasts render acceptance of the Commission's preference classifications under the *Bakke* diversity rationale difficult, if not impossible. The extension of this rationale to broadcasting would wreak havoc on affirmative action programs which this Court and others have recognized as valid, as various minority groups clamor for preferences based upon arguments that one group or another has as muchor more impact upon diversity as the group to whom preferential treatment is afforded.

2. The Commission's Preference Policies Are Not Sufficiently Tailored To The Accomplishment Of Program Diversity To Pass Constitutional Muster.

Assuming, *arguendo*, that the Commission's program diversity goal is a compelling or important governmental interest, the strict scrutiny standard to which a majority of this Court adheres requires that the means chosen be "nar-

rowly tailored" to accomplishment of the goal. *Wygant*, 476 U.S. at 274.[104] Application of this prong of strict or heightened scrutiny to the Commission's preferences leads to the conclusion that the Commission's minority and female ownership promotion policies are not rationally-related, much less narrowly tailored, to the fulfillment of its program diversity goal. Neither do they work, nor do they have any stopping point.

The burden is on the Commission to prove that its preference policies are the "most exact" means to the end of program diversity. *E.g., Bakke*, 438 U.S. at 320. Thus, the Commission's preferences must fail, not only if their rationale is demonstrably false, but also if it is not demonstrably true.[105] The burden also is on the Commission to sustain its gender preference with an "exceedingly persuasive" justification. *Mississippi University for Women*, 458 U.S. at 724; *Kirchberg*, 450 U.S. at 461.

The FCC has not satisfied this burden. First, the Commission has declared that program diversity already exists or is assured by the marketplace. Thus, an indirect attempt to promote such diversity through ownership preferences would appear unnecessary for, or unrelated to, its accomplishment. Second, the Commission's concession that no record demonstrates that use of "a race- or gender-based preference scheme to increase minority and female ownership is essential to achieving that objective," *FCC Steele Brief* at 19. (S.J.A. 81), renders inconceivable the notion that the policies are narrowly tailored; indeed they are without rational basis. Third, the Commission has admitted it has no evidence "on which to base an assumption that a nexus exists between an owner's race or gender and pro-

[104] The heightened scrutiny applied to gender-based classifications and the "strict scrutiny" formula of Justices Marshall, Brennan and Blackmun require that any classifications used be "substantially related" to the achievement of the proffered governmental objective.

[105] *E.g., United States* v. *Paradise*, 480 U.S. 149 (1987) (Stevens, J., concurring) ("the governmental decisionmaker who would make race-conscious decisions must overcome a strong presumption against them.").

gram diversity." *FCC Steele Brief* at 19. (S.J.A. 81). This destroys any claim of narrow tailoring; the Commission is uncertain even of the logic underlying its preference awards. Fourth, "[t]he biggest hurdle to minority ownership is securing the financing . . . ." *St. Louis City Communications, Inc.*, 4 FCC Rcd 5262 (1989). This barrier cannot be overcome by the award of preferences.[106] Fifth, even assuming that the Commission's stereotypes regarding minority and female programming proclivities are true, it is questionable whether program diversity is promoted by the rote application of preference awards for minority and female ownership wherever new frequencies are opened to application; absent analysis of the individual community and its need for a certain type of voice,[107] the Commission's policies might result in heavy concentrations of identical perspectives in a small region, rather than in nation-wide, or even local diversity. Finally, the FCC's preferential treatment policies cannot be narrowly tailored because there is no evidence that the FCC has considered race-neutral means to foster its program diversity objective. *See Croson*, 109 S.Ct. at 728 (O'Connor, J., joined by Rehnquist, C.J., White, J., Stevens, J. and Kennedy, J., majority opinion).

Whatever narrow tailoring *was* present despite these flaws has been destroyed by other policies which undercut

[106] The Commission has indicated its concern relative to minority financing. *See Minority Ownership of Broadcast Facilities*, 69 FCC 2d 1591 (1978). It has not, however, adopted lower financial qualifications standards for minority applicants. *See e.g. Bison City TV 49 Limited Partnership*, 91 FCC 2d 26, 30 n. 5 (Rev. Bd. 1982).

[107] Prior to *TV 9*, the Commission seems to have operated very successfully in much this way. *See e.g., La Fiesta Broadcasting Co.*, 6 FCC 2d 65, 67 (Rev. Bd. 1966) (awarding license to applicant who proposed only Spanish-language broadcasting for Lubbock, Texas area). Pursuant to its earlier race-neutral policy, the FCC allowed an applicant to show that its proposed programming addressed the special needs of minorities in the relevant area. *See Salter Broadcasting Co.*, 8 FCC 2d 1036, 1039-1040 (Rev. Bd. 1967). Non-minority applicants were permitted to make such a showing. *See Herbert Muschel*, 33 FCC 37 (1962). The overall policy was more sensitive both to minority broadcasting interests and to the individual qualities of non-minority applicants than the stark, ethnic- and gender-based preferences the Commission now employs.

the FCC's most basic assumption: that awarding a broadcast license to a minority- or female-controlled applicant results in minority or female ownership. As discussed *supra* at p. 22, the limited partnership device and other passive ownership structures shield certain principals from comparative consideration, even where they are financially responsible for the applicant and proposed station. Accordingly, what appears an award to a minority or female in a comparative proceeding may actually be an award to a "limited partnership" comprised of 100 white males with one minority or female "general partner." It is doubtful that under such circumstances the minority or female will have discretion over programming decisions. Moreover, the Commission's rules permit applicants to sell construction permits immediately upon prevailing in a comparative proceeding, provided station operations have not yet commenced. *James U. Steele*, 4 FCC Rcd at 4704 n. 1. Once an award is made there is no assurance that the minority or female chosen will retain the permit, rather than sell to a non-minority group member, or a male.

The Commission's race-, ethnic- and gender-based preference classifications are loosely-fitted, at best, to the objective of program diversity. Consequently, they violate the equal protection principles embodied in the Due Process Clause of the Fifth Amendment.

3. *Fullilove* Does Not Allay The Necessity Of Reaching Constitutional Determination On This Issue.

Neither *Winter Park* nor *West Michigan* undertook a complete review of the Commission's minority and female preference policies under the equal protection principles set forth hereinabove. Apparently, the reason for this was their conclusion, based upon *Fullilove*, that "any doubt concerning the constitutionality of the FCC's consideration of minority status was ended by Congress' approval of the Commission's goals and means." *West Michigan*, 735 F.2d at 615; *Winter Park*, 873 F.2d at 355. (Pet. App. 15a). For the *West Michigan* court, this "approval" was Congress'

passage of § 115 of the *Communications Amendments Act of 1982*,[108] designed to facilitate the development of a lottery as an alternative to the Commission's comparative process. The legislation required that preferences for minority applicants be incorporated into any random selection licensing scheme adopted by the Commission. *Id.* The *Winter Park* majority found additional acquiescence in the *1988* and *1989 Appropriations Acts*. *Winter Park*, 873 F.2d at 355. (Pet. App. 14a). However, the *Winter Park* majority did not analyze the legislation, deferring instead to the *West Michigan* panel's statement that, "Congress must be understood to have viewed the sort of enhancement used here as a valid remedial measure." *Winter Park*, 873 F.2d at 353 (quoting *West Michigan*, 735 F.2d at 614).

Metro disputes *West Michigan*'s notion that by enacting the 1982 lottery legislation, Congress transmogrified the FCC's race-, ethnic- and gender-based preference scheme into a valid race-based remedial measure. At best, the *West Michigan* court's speculation in this regard was an educated guess; more accurate, perhaps, is Judge Williams' conclusion that "[t]he portion of *West Michigan* addressing remedial concerns is . . . dictum." 873 F.2d at 365 (Pet. App. 38a). The FCC has tendered no remedial rationale for its policies and the courts cannot uphold a Commission action on the basis of reasoning which it has not adopted. *See SEC* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943).

Even if the 1982 lottery legislation is an indicia of congressional intent to employ remedial measures in the broadcast industry,[109] the necessity for equal protection analysis remains. This Court has held that "the mere recitation

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[108] Public Law 97-259, 96 Stat. 1087, Sept. 13, 1982 (codified at 47 U.S.C. §§ 309(i)(3)(A) - (4)(A)) (Pet. App. 102a).

[109] Congress based its lottery preference requirements on findings of "underrepresentation" in the broadcast media, which it characterized as resulting from "the effects of past inequities stemming from racial and ethnic discrimination." *West Michigan*, 735 F.2d at 614 (quoting H.R. REP. NO. 97-765, 97th Cong., 2d Sess. 43, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 2287).

of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." *Croson*, 109 S.Ct. at 722 (O'Connor, J., joined by Rehnquist, C.J., White, J., and Kennedy, J, plurality opinion) (quoting *Wiesenfeld*, 420 U.S. at 648). "Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Id.* at 721. Both the factual basis for enactment of the classification and the nexus between its scope and the basis should be examined. *Id.* In the case of the lottery legislation, such analysis is crucial to any determination that (1) Congress intended for the FCC to apply race- and ethnic-based remedial measures in its comparative hearing context, or that (2) Congress identified past discrimination with sufficient particularity to justify the imposition of race- and ethnic-based classifications. *West Michigan*'s reliance on findings of "underrepresentation," without more, to justify the Commission's adoption of constitutionally disfavored classifications, thus was premature.[110]

No evidence indicates that Congress intended its 1982 lottery legislation to receive substantive application in the comparative hearing context. Thus, the FCC's expansion of its court-ordered comparative preferences for *black* ownership and participation to other minority groups listed in the lottery statute,[111] must be perceived as an independent act of the Commission, warranting review under the standard applicable to federal administrative agencies, which, as Metro has noted, should be strict scrutiny.

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[110] *See Croson*, 109 S.Ct. at 724-725 (O'Connor, J., plurality opinion) ("[t]he district court . . . relied on the highly conclusionary statement . . . that there was racial discrimination in the construction industry . . . [t]hese statements are of little probative value . . . when a legislative body chooses to employ a suspect classification, it cannot rest upon a generalized assertion as to the classification's relevance to its goals.").

[111] *See* discussion at note 18, *supra*..

Moreover, no evidence suggests that Congress' remarks regarding "underrepresentation" of certain minorities was tantamount to "findings" of past discrimination in the broadcasting industry.[112] At best, Congress was referring to generalized societal discrimination. And, whereas, Congress "may" be able to "identify and redress the effects of society-wide discrimination,"[113] that does not mean other governmental bodies may do so.[114] "Underrepresentation" is not a sufficient basis for remedial action, especially here, where special qualifications are required to obtain a broadcast license. "When special qualifications are required . . . comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." Croson 109 S.Ct. at 725; *Hazelwood School District*, 433 U.S. at 307-308.[115] A governmental body other than Congress must have a "firm basis" for believing that remedial action is required. *Wygant*, 476 U.S. at 266 (O'Connor, J., concurring). That no such basis was before the Commission is evidenced by its consistent refusal to claim any purpose other than program diversity for its preferences.

Even if congressional findings of past discrimination in the broadcast industry were present (which they are not), the Commission, like the City of Richmond, would not have plenary authority to rely upon those findings for the construction of its own remedial program unless the evidence pointed to its own prior discrimination, which it then seeks

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[112] *See Winter Park*, 873 F.2d 365 (Williams, J., dissenting) ("[n]either Congress nor the FCC ever found any evidence to link minority 'underrepresentation' to discrimination by the FCC or to particular discriminatory practices in the broadcasting industry.").

[113] *Croson* 109 S.Ct at 719 (O'Connor, J., plurality opinion).

[114] *See Fullilove*, 448 U.S. at 483 (Burger, C.J., plurality opinion) ("in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equl protection guarantees.").

[115] *See also Mayor* v. *Educational Equality League*, 415 U.S. 605, 620 (1974).

to eradicate. *Id.* at 722; *Bakke*, 438 U.S. at 307. "For the governmental interest in remedying past discrimination to be triggered, 'judicial, legislative, or administrative findings of constitutional or statutory violations' must be made. Only then does the Government have a compelling interest in favoring one race over another." *Croson*, 109 S.Ct. at 723; *Bakke*, 438 U.S. at 308-309.

The 1982 lottery legislation, therefore, could not justify the Commission's preference scheme and provides no support for subjecting FCC policies to a more deferential standard of review. Moreover, regardless of the Court's determination in this regard, strict scrutiny analysis must be applied to the *FCC's* gender-based preference classifications (women were not listed as a minority group in the lottery statute) and its preference for black ownership and participation, established by the *courts*. The deferential standard of review sometimes afforded *Congress* under *Fullilove* provides no justification for overlooking infirmities inherent in the *Commission*'s preference policies and in court-ordered remedial mandates based on inadequate findings.

II. Congress' *1988, 1989* And *1990 Appropriations Acts* Exceeded Its Authority Under Section 5 Of The Fourteenth Amendment And Violated The Equal Protection Principles Embodied In The Due Process Clause Of The Fifth Amendment To The Constitution.

The provisions of the *1988 Appropriations Act*,[116] which, *inter alia*, entrenched the FCC's minority and female preferences in the midst of legal challenges thereto, and dictated the results reached in the instant case,[117] have been

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[116] *Continuing Appropriations Act for Fiscal Year 1988 and for Other Purposes*, Public Law No. 100-202, 101 Stat. 1329-31 (1987).

[117] *See* S. Rep. No. 100-182, 100th Cong., 1st Sess. (1987) (S.J.A. 55) ("[t]he Committee also instructs the Commission to resolve, within 60 days all proceedings that have been remanded by the court of appeals, including . . . *Winter Park Communications* v. *Federal Communications Commission* . . . in a manner consistent with the policies that mandated incentives for minorities and women in broadcast ownership.").

renewed by Congress each subsequent fiscal year.[118] The lower court, noting that Congress "has interceded at least twice to endorse the FCC's policy of awarding enhancements for minority ownership," apparently felt that the enactments were valid exercises of Congress' remedial powers under § 5 of the Fourteenth Amendment, although the issue was not discussed in detail. *Winter Park*, 873 F.2d at 354 (Pet. App. 14a-15a). However, this Court's subsequent decision in *Croson*, undermines the lower court's conclusion.

Pursuant to *Croson*, the Fourteenth Amendment's § 5 conferral of power upon Congress to enact *remedial* legislation is an explicit constraint upon the power of *States*. 109 S.Ct. at 710. Accordingly, the Fourteenth Amendment is inapplicable. Congress' action with regard to the FCC, a *federal agency*, is unrelated to its power to curtail *State* discrimination. Nor are the *Appropriations Acts* remedial. The legislative histories of the Acts reveal "program diversity," rather than amelioration of prior discrimination to be Congress' goal.[119] Because no remedial purpose is involved in the relentless pursuit of program diversity, the *Appropriations Acts* appear to be the result of a "congressional desire to prefer one racial or ethnic [or gender] group over another," in violation of the equal protection component of the Due Process Clause of the Fifth Amendment. *Fullilove*, 448 U.S. at 497 (Powell, J., concurring).

Whereas, the enactements are buried in appropriations measures, rather than constituting a "considered decision of Congress and the President," *Fullilove*, 448 U.S. at 473, strict scrutiny equal protection review is appropriate. Although appropriations measures are "Acts of Congress,"

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[118] *See Department of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act of 1989*, Public Law 100-457, 102 Stat. 2216-17 (1988); *Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act of 1990*, Public Law 101-162, 103 Stat. 988 (1989).

[119] *See* discussion in *Winter Park*, 873 F.2d at 363-65 (Williams, J., dissenting).

they "have the limited and specific purpose of providing funds for authorized programs." *TVA* v. *Hill*, 437 U.S. 153, 190 (1978). "When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful, and not for any purpose forbidden." *Id.* If this assumption is not protected, it would lead to the "absurd result of requiring Members to review exhaustively the background of every authorization before voting on an appropriation." *Id.* Such a burden would have been particularly onorous with respect to the *1988 Appropriations Act*, in which legislators had only three hours to review its 43 pounds and 3,286 pages of documentation. *President's State of the Union Address*, 24 WEEKLY COMP. PRES. DOC. 87 (Jan. 25, 1988).

Neither Congress nor a State can validate a law that denies the rights of equal protection. *Califano* v. *Goldfarb*, 430 U.S. 199, 210 (1977); *Williams* v. *Rhodes*, 393 U.S. 23, 29 (1968). And, a statute apparently governing a dispute "cannot be applied by judges, consistently with their obligations under the Supremacy Clause, when such an application of the statute would conflict with the Constitution." *Marbury* v. *Madison*, 2 L.Ed 60 (1803); *Younger* v. *Harris*, 401 U.S. 37 (1971).

CONCLUSION

For the foregoing reasons, the decision and judgment of the court of appeals should be reversed, the Commission's minority and female preference policies declared unconstitutional, and the construction permit for Channel 65 at Orlando, Florida awarded to Metro.

Respectfully submitted,

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APPENDIX

APPENDIX TO BRIEF

The applicable provisions of the *Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act*, 1990, Public Law 101-162, 103 Stat. 988 (1989):

> For necessary expenses of the Federal Communications Commission . . . *Provided*, That none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, of to continue a reexamination of, the policies of the Federal Communications Commission with respect of comparative licensing, distress sales and tax certificates granted under 26 U.S.C. 1071, to expand minority and women ownership of broadcasting licenses, including those established in the Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C. 2d 979 and 69 F.C.C. 2d 1591, as amended 52 R.R. 2d 1313 (1982) and *Mid-Florida Television Corp.*, 60 F.C.C. 2d 607 (Rev. Bd. 1978), which were effective prior to September 12, 1986, other than to close MM Docket 86-484 with a reinstatement of prior policy and a lifting of suspension of any sales, licenses, applications, or proceedings, which were suspended pending the conclusion of the inquiry. . . .